

**No. 78-572**

Supreme Court, U. S.

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1978

**UNITED STATES PAROLE COMMISSION, et al.,**

*Petitioners,*

vs.

**JOHN M. GERAGHTY**

On Petition For A Writ Of Certiorari To The United States  
Court Of Appeals For The Third Circuit

**BRIEF OF JOHN M. GERAGHTY IN OPPOSITION**

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John M. Geraghty, on behalf of all federal prisoners who have been or who will be denied parole through application of the federal parole guidelines, files the following in opposition to the petition for writ of certiorari.

**OPINIONS BELOW**

The opinion of the Court of Appeals (Pet.App. 1a-73a) is reported at 579 F.2d 238 (3d Cir. 1978). The opinion of the District Court (Pet.App. 77a-93a) is reported at 429 F.Supp. 737 (M.D.Pa. 1977).

## JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1978; rehearing was denied on May 8, 1978. The petition for writ of certiorari was timely filed, by virtue of two extensions of time, on October 5, 1978. The petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. May an order refusing to allow a case to proceed as a class action be reviewed on an appeal from a final decision of the case, irrespective of the status of the personal claim of the original plaintiff, when the existence of an actual controversy between the defendants and the unnamed members of the plaintiff class is undisputed?
2. Whether, on the facts of this case, the Court of Appeals erred in reversing the District Court's adverse class determination and remanding the case for further consideration of the class issue?
3. Did the Court of Appeals, in reversing the grant of summary judgment, correctly conclude that if on remand the District Court determines that the case should be certified as a class action, the plaintiff class is entitled to a trial on the merits of their detailed factual allegations that the federal parole guidelines are unlawful or unconstitutional, either on their face or as applied?

## STATEMENT

In 1973, the federal parole board adopted<sup>1</sup> explicit parole release criteria—the parole “guidelines”—for adult prisoners.<sup>2</sup> Because these guidelines are “loosely based” upon the board’s policies in Youth Correction Act, cases<sup>3</sup>

<sup>1</sup> The parole guidelines were first issued on November 19, 1973. 38 Fed.Reg. 31942 (1973). Following *Pickus v. United States Board of Parole*, 507 F.2d 1103 (D.C. Cir. 1974), which held that promulgation of the guidelines was governed by the publication and notice standards of the Administrative Procedure Act, 5 U.S.C. §§701-706, the guidelines were repromulgated on an emergency basis, 39 Fed.Reg. 45296 (1974), and were reissued on September 5, 1975. 40 Fed.Reg. 41328. With the effective date of the Parole Commission and Reorganization Act of 1976, Pub.L. 94-233 (March 15, 1976), the Parole Commission repromulgated the guidelines on an emergency basis. 41 Fed. Reg. 19330-31, 19341 (1976). Subsequent revisions appear at 41 Fed.Reg. 37322 (1976), 42 Fed.Reg. 12045 (1977), 42 Fed.Reg. 31786 (1977) and 42 Fed.Reg. 52399 (1977). The most recent proposed changes in the guidelines were published on October 11, 1978. 43 Fed.Reg. 46859-67 (1978).

<sup>2</sup> Explicit parole release criteria were held to be constitutionally required in *Childs v. United States Board of Parole*, 371 F.Supp. 1246 (D.D.C. 1973). The parole board acquiesced in that portion of the district court's decree. See 511 F.2d 1270, 1273-74 (D.C. Cir. 1974) (affirming other portions of the decree which had been challenged by the parole board).

<sup>3</sup> In its answer to the complaint in this case, the Parole Commission admitted that the present guidelines are “loosely based” on the parole board’s policies in Youth Correction Act (18 U.S.C. §5005 et seq.) cases. This YCA policy was of dubious legality. Rather than making “execution of sentence . . . fit the person, not the crime for which he was convicted,” *Dorszynski v. United States*, 418 U.S. 424, 434 (1974), the parole board was basing its YCA release decisions primarily upon a subjective judgment of offense severity. P. Hoffman, *Paroling Policy Feedback* 16 (NCCD Parole Decisionmaking Project Supp.Rep. No. 8, 1973). In its answer, the Commission also admitted that Hoffman, *supra*, is one of three reports which describe the creation of the guidelines.

in which there is no judicially set length of sentence,<sup>4</sup> the adult guidelines make the parole release decision depend primarily on whether the prisoner has served a "customary length of imprisonment" which is not related to the actual sentence imposed. This "customary length of imprisonment" exceeds the actual sentence imposed on at least 65% of all persons convicted of federal offenses,<sup>5</sup> and in less than seven percent of all cases will parole be granted before a prisoner has served this "customary length of imprisonment."<sup>6</sup> Thus, for the 27% of all prisoners who re-

<sup>4</sup> A committed youth offender may be released at any time after incarceration. 18 U.S.C. §5017(a).

<sup>5</sup> Approximately half of all persons convicted of federal offenses are sentenced to probation. See Administrative Office of the United States Courts, *Federal Offenders in the United States District Courts* 1970 41 (1972). For those sentenced to a term of probation, the "customary length of imprisonment," of course, is zero. As to persons sentenced to imprisonment, information provided by the Parole Commission in this case shows that almost 27% of persons who are eligible for parole are denied parole because their sentence is too short to allow them to serve the "customary length of imprisonment" of the guidelines. And according to a spokesman for the Office of Improvements in the Administration of Justice of the Department of Justice, "approximately 50 percent of the defendants sentenced to imprisonment . . . are eligible for parole at the time recommended in the guidelines . . ." Hearings on S. 1437 before the Subcomm. on Criminals Laws and Procedure of the Sen. Comm. on the Judiciary, 95th Cong., 1st Sess., pt. 12, at 9000 (1977).

<sup>6</sup> In fiscal year 1975, 91.3% of all prisoners were required to serve at least their "customary length of imprisonment" before being paroled. The percentage increased slightly to 93.2% in 1976 and was relatively unchanged in 1977 at 93.4%. B. Stone-Meierhoefer, *Workload and Decision Trends Statistical Highlights 10/74-9/77*, 10 (United States Parole Commission Research Unit Report Eighteen, 1977).

ceive "lenient" prison sentences, parole is routinely denied.<sup>7</sup>

The plight of John M. Geraghty, the named plaintiff, is typical of the several thousand prisoners who each year are denied parole through application of the parole guidelines.<sup>8</sup> Geraghty initially received a 48 month sentence, imposed under the provisions of 18 U.S.C. §4208(a)(2) (1970).<sup>9</sup> Although this sentence was subsequently reduced to 30 months on a timely Federal Rule of Criminal Procedure 35 motion, see *United States v. Braasch*, 542 F.2d 442 (7th Cir. 1976), Geraghty was nonetheless denied parole because his "customary length of imprisonment" was set by the parole board as 36 to 48 months.

Geraghty believed that he, along with thousands of others, had been wrongfully denied parole, and with the assistance of counsel brought this action individually and on behalf of a class to challenge the legality of the guidelines. Geraghty sought a prompt determination of whether

<sup>7</sup> Information provided by the Parole Commission in this case shows that 6151 initial parole hearings were held from October, 1977 to March, 1978, and that in 1635 of those hearings, parole was denied because the prisoner would completely serve his sentence before he could serve the "customary length of imprisonment" of the guidelines.

<sup>8</sup> Approximately 10,000 prisoners are considered for parole each year. B. Stone-Meierhoefer, *supra* note 6, 1. The percentage of prisoners who are denied parole has varied from 41.2% in fiscal year 1975 to 46.7% in fiscal year 1976 to 55.9% in fiscal year 1977. *Id.* at 7.

<sup>9</sup> The Parole Commission admitted in its answer to the complaint that a prisoner sentenced under 18 U.S.C. §4208(a)(2) (1970) (renumbered as 18 U.S.C. §4205(b)(2) in the 1976 amendment to the parole statute) is considered for parole under the same guidelines as a prisoner who received a regular adult sentence.

the case could proceed as a class action by filing a motion to certify the case as a class action with his complaint. In addition, Geraghty sought interim individual relief so that his personal claim would not be rendered moot by the impending expiration of his sentence.

Without ruling on Geraghty's motions,<sup>10</sup> the District Court for the District of Columbia<sup>11</sup> transferred the case to the Middle District of Pennsylvania, where Geraghty was then confined. Following transfer of the case, Geraghty renewed his request for class certification and his application for interim relief.<sup>12</sup> The district court, however, postponed ruling on the class motion until it was ready to announce its decision on defendants' motion for summary judgment. (The district court never ruled on the application for interim relief.)

In the view of the district court, the case was a habeas corpus action (App. 80a), to which Civil Rule 23 was ap-

<sup>10</sup> Geraghty's attempt to remedy this inaction by recourse to a writ of mandamus was denied without opinion. *In re Geraghty*, No. 76-1975. D.C. Cir., November 16, 1976.

<sup>11</sup> The case had been filed in the District of Columbia as a related case to *Cale v. Attorney General*, No. 75-1822 (D.D.C.), *appeal dismissed as moot*, 543 F.2d 416 (D.C. Cir. 1976) (table). *Cale* was brought as a "test case" by four of Geraghty's codefendants, and raised the same issues subsequently advanced by the same counsel on behalf of Geraghty.

<sup>12</sup> Geraghty also filed an amendment to his complaint, adding an individual habeas corpus claim and joining the Warden of the Allenwood Prison Camp as a party. It is this amendment which brought into the case the issues which "relate solely to plaintiff's individual case" mentioned in the opinion of the district court (App. 82a) as grounds for refusing to certify the case as a class action. Geraghty excluded the denial of individual habeas corpus relief from his notice of appeal.

plicable only "by analogy." (App. 81a-82a.) Under this analogy, class treatment was denied on the ground that it was "neither necessary nor appropriate." (App. 82a.) Class certification was not "necessary," the district court reasoned, because the class claims could be litigated in an individual action. (App. 82a.) Class status was deemed to be inappropriate because two of the issues raised in Geraghty's amendment to the complaint "have no class-wide applicability" (*id.*),<sup>13</sup> because "not all members of the class have the same interest as plaintiff" (*id.*), and because the district court "does not have habeas corpus jurisdiction over all members of the proposed class." (App. 83a.)

On the merits, the district court rejected all of Geraghty's substantive contentions. (App. 83a-92a.) Geraghty filed a timely notice of appeal. Thereafter, Eliezer Becher, another prisoner who had been denied parole through application of the guidelines and who was represented by Geraghty's counsel, sought to intervene. As Becher explained in his petition to intervene, he sought to join in the case to insure that the legal issues raised by Geraghty on behalf of the class "will not escape review in the appeal in this case." The district court denied the petition to intervene, concluding that the filing of Geraghty's notice of appeal had divested it of jurisdiction. Becher then filed a timely notice of appeal from the denial of intervention, and the two appeals were consolidated.

Although the Court of Appeals expedited the appeals, its decision came after Geraghty and Becher had satisfied their sentences. In a comprehensive opinion, Judge Adams, writing for a unanimous court, held that Geraghty's release from custody did not render the case moot if the district

<sup>13</sup> See note 12 *supra*.

court had improperly refused to certify the case as a class action. (App. 10a-28a.) Turning to the class issue, the Court of Appeals held that the district court had erred in viewing the case as a habeas corpus proceeding (App. 7a-10a), and in concluding that Civil Rule 23 was applicable only "by analogy." Noting that Rule 23 did not include a "necessary" standard, the Court of Appeals held that the district court had erred in relying on this rationale in refusing to allow the case to proceed as a class action. (App. 28a.) The case was therefore remanded to the district court with instructions to determine if the proposed class (or, if necessary, subclasses) satisfied the requirements of Rule 23(a). (App. 32a & n. 66.)

The Court of Appeals viewed the merits of the substantive class claims only insofar as it was necessary to determine that a remand would not "improvidently dissipate judicial effort," which would be the case if the "district court were correct in its determination that Geraghty's substantive contentions are devoid of merit." (App. 32a-33a.) The Court noted that the material facts were in dispute (App. 36a n. 75), and followed the ordinary rule of viewing the evidence in the light most favorable to Geraghty, the party who had opposed the grant of summary judgment. (App. 36a.)

Geraghty's substantive contentions were analyzed by the Court of Appeals in two categories--whether the parole guidelines are contrary to the parole statute (App. 33a-54a), and whether, as applied to certain prisoners, the guidelines are of *ex post facto* effect. (App. 46a-65a.) After a careful analysis of the language of the parole statute (App. 36a-39a), of its legislative history (App. 39a-46a), and of the constitutional problems which would be present if the guidelines "function as Geraghty alleges" (App.

48a) and "as automatically as Geraghty alleges" (App. 52a), the Court of Appeals concluded that the question of whether the guidelines are consistent with the statute "may be disposed of only on a full record." (App. 54a.) The *ex post facto* claim was also held to be incapable of resolution on the present record. (App. 65a.)

Rehearing and a suggestion that the case be reheard *in banc* were denied without opinion and without a vote of the Court. Following issuance of the judgment of the Court of Appeals, the District Court received memoranda from the parties on the class issue, held a preliminary hearing on the class question, but has withheld ruling either on the class motion or on plaintiff's motion to add additional plaintiffs.

## REASONS FOR DENYING THE PETITION

All that is involved at the present stage of this case is a decision of the Court of Appeals that if the district court determines that a class should be certified, the plaintiff class is entitled to a trial to seek to prove its allegations about the creation and application of the federal parole guidelines. Following a trial, this case may well result in a declaration that the parole guidelines are unlawful, and review by this Court may well be appropriate at that juncture. But review at the present interlocutory stage of the case will require the Court to adjudicate weighty questions on the basis of facts which the plaintiff class may be unable to establish. Certiorari should therefore be denied as to the substantive issues subsumed in questions three and four of the petition for writ of certiorari.

Nor should certiorari be granted to review the procedural questions raised in the petition. The decision of the Court of Appeals that the district court's adverse class determination could be reviewed on appeal from the final decision of the case is consistent with prior and subsequent decisions of this Court. (The assertedly contrary view of the Seventh Circuit was abandoned in a decision of that court announced after the filing of the petition.) The other question presented in the petition, relating to a potential need for subclasses after remand, is not presented by this case.

### I.

Petitioners do not deny that there continues to be a live controversy between the unnamed members of the putative class and the Parole Commission.<sup>14</sup> Nonetheless, petition-

<sup>14</sup> Several members of the putative class have sought to be substituted as respondents in this Court or, alternatively, to intervene. This motion, filed on November 6, 1978, has not as yet been ruled upon. The same prospective additional respondents-petitioning intervenors have also applied to the district court to be added as plaintiffs.

ers argue that the district court's refusal to allow the case to proceed as a class action may not be reviewed on appeal if the personal claim of the original plaintiff has become moot.

This mootness argument is identical to the theory rejected by the Court in *United Air Lines v. McDonald*, 432 U.S. 385 (1977). One issue in that case was whether original plaintiffs in a class action may seek review of an adverse class determination after they had settled their individual claims.<sup>15</sup> This question was answered in the affirmative. "The District Court's refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs, as *United* concedes." *Id.* at 393 (footnote omitted).

The decision of the Court of Appeals in this case is faithful to *McDonald*,<sup>16</sup> and is required by this Court's subsequent decisions in *Coopers & Lybrand v. Livesay*, 46 U.S.L.W. 4757 (June 21, 1978) and *Gardner v. Westinghouse*, 46 U.S.L.W. 4761 (June 21, 1978). Petitioners would limit these cases, and their holding that an adverse class determination may absent an interlocutory appeal pursuant to 28 U.S.C. §1292(b) be reviewed only on appeal from the final decision of the case, to situations where an individual claim is "inherently temporary in nature and capable of

<sup>15</sup> This question was preliminary to the other issue in *McDonald*—whether unnamed class members may intervene after judgment to seek review of an adverse class determination when the original plaintiffs have refused to do so. Obviously, if the original plaintiffs could not appeal, the unnamed class members could not intervene to do so. See 432 U.S. at 400 (Powell, J., dissenting).

<sup>16</sup> Petitioners' assertion that "no question of mootness was involved" in *McDonald* (Pet. 18 n. 11) is plainly wrong. See note 13 *ante*.

evading judicial review even at the trial court level.” (Pet. 17.) But neither *Coopers & Lybrand* nor *Gardner* involved a claim which is “inherently temporary in nature.” *Coopers & Lybrand* involved allegations of long completed violations of the federal securities laws and *Gardner* was an employment discrimination action. In both cases, the Court relied on *United Air Lines v. McDonald*, *supra*, and held that review of the district court’s adverse class determination would be subject to “effective review after final judgment at the behest of the named plaintiff or intervening class members.” *Coopers & Lybrand*, 46 U.S.L.W. at 4759; *Gardner*, 46 U.S.L.W. at 4762 n. 6.

Finally, there is no substance to petitioners’ assertion (Pet. 15-16) that the decision of the Court of Appeals is in “direct conflict” with a decision of the Seventh Circuit, *Winokur v. Bell Federal Savings & Loan Association*, 560 F.2d 271 (7th Cir. 1977). Subsequent to the filing of the petition for writ of certiorari, the conflicting dicta in *Winokur* was repudiated by the Seventh Circuit in *Susman v. Lincoln America Corp.*, \_\_\_\_\_ F.2d \_\_\_\_\_, No. 78-1293 (7th Cir. October 23, 1978), where the Seventh Circuit expressly agreed with the decision of the Third Circuit in this case. (*Susman*, slip op. 7.)

## II.

The second question posed in the petition for writ of certiorari is not presented in this case and plainly misconceives the decision of the Court of Appeals. Contrary to petitioners’ assertion, this case does not present the question of whether a district court must *sua sponte* seek to construct subclasses “even though the plaintiff has not requested it to do so.” (Pet. 19.)

First, plaintiff had no opportunity to suggest that subclasses be created. Although plaintiff repeatedly requested that the district court comply with Civil Rule 23(c)(1) and rule on the class motion as soon as practicable, the district court refused to rule on plaintiff’s motion to certify the case as a class action until it was ready to announce its decision on the merits. If the district had ruled on the class motion prior to its decision on the merits, and had denied class status because the class as originally proposed was overinclusive, it is obvious that the plaintiff would have proposed a redefinition of the class.

Second, the Court of Appeals did not hold that the district court should have considered subclassing because of conflicts within the class proposed by plaintiff. On the contrary, the Court of Appeals carefully noted that “it is not clear that a divergence of interest exists.” (App. 31a.) While the Court of Appeals did discuss the use of subclassing to eliminate conflicting interests within a class, it did so only in the context of providing guidance for the district court on remand.

## III.

Questions three and four of the petition relate to Geraghty’s claims that the parole guidelines are contrary to the Parole Commission and Reorganization Act of 1976, Pub.L. 94-233 (March 15, 1976)<sup>17</sup> and, as applied to certain pris-

<sup>17</sup> Contrary to petitioners’ assertion (Pet. 28), this question was expressly reserved in *Garcia v. United States Board of Parole*, 557 F.2d 100, 107 n. 7 (7th Cir. 1977), where Geraghty appeared as an amicus curiae. Nor was this question resolved by the dicta cited by petitioners (Pet. 28) in *Banks v. United States*, 553 F.2d 37, 40 (8th Cir. 1977).

oners, are of *ex post facto* effect.<sup>18</sup> The Court of Appeals held that these claims could not be resolved on the present record "since the Parole Commission has presented contradictory material, and since a large part of Geraghty's proof is inferential." (App. 36a n. 75.) Accordingly, the case was remanded to allow the plaintiff class—if one is certified by the district court—to prove Geraghty's recapitulation of the function and genesis of the guidelines" (App. 46a), and to resolve the dispute as to "the actual functioning of the guidelines." (App. 54a.)

Petitioners would deprive the plaintiff class of a full and fair opportunity to prove these allegations by referring the Court to a text and an article "[f]or a history of this development and a description of the [parole guideline] system." (Pet. 25 n. 19.) These secondary sources, of course, were not developed after an adversary hearing, and—as will be shown in the district court—these secondary sources are seriously in error about the function and genesis of the guidelines.

In the district court, the plaintiff class intends to prove that the parole guidelines implemented a new policy for parole release decisionmaking, and that this new policy was based on an incorrect view of federal criminal law. The plaintiff class will also show that the reason why length of sentence is not included in the present guidelines is because these guidelines were derived from a study of release policies in Youth Correction Act (18 U.S.C. §5005 et seq.)

<sup>18</sup> As the Court of Appeals recognized (App. 61a-62a), the asserted conflict (Pet. 30) between the decision on the *ex post facto* issue in this case and *Ruip v. United States*, 555 F.2d 1331 (6th Cir. 1977), and *Shepard v. Taylor*, 556 F.2d 648 (2d Cir. 1977), is a disagreement about the facts—which are not reliably determined in those cases—rather than about the law.

cases, where there is no maximum sentence. As plaintiffs will show in the district court, it is possible to develop guidelines which weigh the actual sentence imposed, and that such guidelines have been fashioned for the parole systems in North Carolina, Virginia, Louisiana, and Missouri. These states adopted such guidelines because, unlike the federal parole board, the parole authorities in these states were not willing to ignore the statutory limitations on their powers.

In addition, the plaintiff class will demonstrate that the "customary lengths of imprisonment" of the parole guidelines bear no relation to the "customary length of imprisonment" served prior to adoption of the guidelines. The plaintiff class will prove that prior to adoption of the guidelines, the most significant factor in the parole release decision was the length of sentence imposed by the sentencing court. They will also show that under the guidelines, the parole release decision has been primarily dependent upon a mechanical and arbitrary predetermination of offense severity. The plaintiff class will also prove that the guidelines have, in general, enhanced the relative severity of sentences imposed for offenses committed prior to the adoption of the P&A in 1976.

These complicated factual questions will involve a careful analysis of the often deceptive statistics pertaining to actual paroling policies before and after adoption of the guidelines. In addition, expert testimony will likely be required to aid the district court in understanding the pseudo-scientific methodology underlying the federal parole guidelines, especially as it compares to the methodology used to fashion guidelines for other jurisdictions. There will also be a full adversarial hearing into the creation and applica-

tion of the guidelines. For example, while the Parole Commission continues to assert that the guidelines "are not intended to be used as a form of criminal code," 43 Fed.Reg. 46859, 46860 (October 11, 1978), we expect the evidence to show precisely the opposite, i.e., that the guidelines are in fact used as a form of criminal code.

It might be, of course, that the plaintiff class will be unable to prove all that it intends to prove. But if review is granted at this juncture, the Court must, under the rule of *United States v. Diebold*, 369 U.S. 654 (1962), view the record in the light most favorable to the plaintiff class, and the result might be to decide the case on the basis of facts which cannot be established. For this reason, certiorari should be denied, on "[t]he salutary principle that the essential facts should be determined before passing upon grave constitutional questions," *Polk Co. v. Glover*, 305 U.S. 5, 10 (1938).<sup>10</sup>

### CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

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<sup>10</sup> We assume that the questions which will ultimately be decided in this case will not be addressed in either *Bonnanno v. United States*, No. 77-1665, or *United States v. Addonizio*, No. 78-156, petitions for certiorari granted December 11, 1978, since the prisoners in neither of these cases challenge the validity of the guidelines.

